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7 Attorneys for Plaintiff  
United States of America

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

10  
11 UNITED STATES OF AMERICA ) Criminal Case No. 08cr1602DMS  
12 Plaintiff, ) Date: July 21, 2008  
13 v. ) Time: 11 a.m.  
14 MICHAEL DOUGLAS MOORE, )  
15 Defendant )  
\_\_\_\_\_  
**GOVERNMENT'S TRIAL  
MEMORANDUM**

17 COMES NOW the plaintiff, United States of America, by and through  
18 its counsel, Karen P. Hewitt, United States Attorney, Caleb E. Mason,  
19 Assistant United States Attorney, and Paul S. Cook, Assistant United  
20 States Attorney, respectfully submits the following Trial Memorandum.

I

## STATEMENT OF THE CASE

## A. CHARGES

24 On May 15, 2008, defendant Michael Douglas Moore ("Defendant")  
25 executed a waiver of indictment, and was charged by Information with  
26 one count of importation of marijuana in violation of 21 U.S.C.  
27 sections 952 and 960. On July 17, 2008, a federal grand jury in the  
28 Southern District of California returned a two-count Indictment  
charging Defendant with: (i) importing approximately 51.03 kilograms

1 (112.26 pounds) of marijuana into the United States in violation of  
2 21 U.S.C. sections 952 and 960; and (ii) possessing approximately  
3 51.03 kilograms (112.26 pounds) of marijuana with intent to distribute  
4 in violation of 21 U.S.C. Section 841(a)(1). Defendant is scheduled  
5 to be arraigned on the indictment on July 18, 2008.

6       **B. TRIAL STATUS**

7       Trial is scheduled for Monday, July 21, 2008, at 11:00 a.m.  
8 before the Honorable Judge Dana M. Sabraw. The United States  
9 anticipates that its case-in-chief will last two days. The court has  
10 set a motion hearing, in the alternative, for August 24, 2008. The  
11 defense has not yet filed any motions.

12      **C. STATUS OF COUNSEL**

13      Defendant is represented by John Ellis, Esq., Federal Defenders  
14 of San Diego, Inc., appointed counsel.

15      **D. CUSTODY STATUS**

16      Defendant is not in custody. On April 21, 2008, he was released  
17 on a \$10,000 bond, secured by his own signature, by order of United  
18 States Magistrate Judge Peter C. Lewis.

19      **E. INTERPRETER**

20      The United States does not need an interpreter for any of its  
21 witnesses.

22      **F. JURY WAIVER**

23      Defendant has not waived trial by jury.

24      **G. PRE-TRIAL MOTIONS**

25      No motions have been filed.

26      **H. STIPULATIONS**

27      The parties have not yet entered into any stipulations in this  
28 case.

## I. DISCOVERY

2 The United States is complying with its discovery obligations.  
3 Defendant has not provided reciprocal discovery.

II

**STATEMENT OF FACTS**

**A. DEFENDANT'S APPREHENSION**

## 1. Primary Inspection

8 On April 18, 2008, at approximately 3 p.m., Defendant entered the  
9 United States at the Andrade Port of Entry as the driver and sole  
10 occupant of a 1995 bronze-colored Nissan Pathfinder bearing California  
11 licence plates. During primary inspection, Customs and Border  
12 Protection Officer (CBPO) James Williams noticed that Defendant was  
13 very talkative and appeared nervous. Defendant made a negative  
14 declaration. He stated that he did not want to go to Mexico and "just  
15 wanted to leave the area." Officer Williams referred Defendant and  
16 the vehicle to secondary.

## 2. Secondary Inspection

18 In the secondary lot, Officer Sara Jimenez requested that Officer  
19 Michael Medley screen the vehicle with his narcotics detector dog,  
20 "Blackjack." Officer Medley conducted the screening, and the dog  
21 alerted to the rear of the vehicle. Upon closer inspection, Officers  
22 Jimenez and Medley discovered a total of 24 packages concealed inside  
23 all four tires of the vehicle. One of the packages was probed and a  
24 sample of a green leafy substance was obtained which field tested  
25 positive for marijuana. The 24 packages had a combined weight of  
26 approximately 51.03 kilograms (112.26 pounds).

**B. DEFENDANT'S STATEMENT**

1       Defendant was advised of his Miranda rights and waived them. He  
2 made a statement which was witnessed by Special Agents Enrique  
3 Torregrosa and Lance Swanson of Immigration and Customs Enforcement  
4 (ICE). The statement was not recorded because recording devices were  
5 temporarily unavailable at the Andrade POE due to ongoing remodeling  
6 and construction.

7       Defendant stated that he lived in Downey, California, and that  
8 a recent back injury prevented him from working. His next-door  
9 neighbor, one Jorge, told him about an opportunity to make \$3000  
10 driving a load of marijuana from Andrade to Downey. He accompanied  
11 Jorge to Mexicali in Jorge's vehicle, where he was introduced to one  
12 "Cooper" or "Cuba," who was the supplier of the marijuana.

13       Cooper supplied the load vehicle, the 1995 Pathfinder. Defendant  
14 observed him driving it when he and Jorge arrived at Cooper's house.  
15 Cooper and Jorge took the vehicle from the house and brought it back  
16 freshly washed and with new tires. Defendant noticed the new tires  
17 because they were racing tires, as opposed the stock tires that had  
18 been on the Pathfinder when he had previously observed it. Cooper  
19 told Defendant that he wanted him to cross the marijuana into the  
20 United States, and wanted him to bring a female passenger with him as  
21 a decoy. Defendant refused to take the passenger.

22       Defendant agreed to cross the vehicle for \$3000. His  
23 instructions were to drive to Downey and then call Jorge, who would  
24 pay him. Jorge crossed directly ahead of Defendant at the POE.  
25 Defendant knew the contraband was in the tires because the vehicle  
26 handled poorly when he drove it.

27       After Defendant's interview was completed, the ICE agents  
28 obtained a portable recording device. While Defendant was being

1 transported from the POE to the Imperial County Jail, he made a series  
2 of statements that were recorded by ICE Special Agent Lance Swanson.  
3 Agent Swanson re-Mirandized Defendant before asking him any questions.  
4 Defendant reiterated that he understood his rights and wanted to  
5 cooperate. In the statement, he reiterated that he had come Mexicali,  
6 with his neighbor Jorge, to make \$3000 driving a load of marijuana to  
7 Downey, CA. He reiterated that he knew there was marijuana in the  
8 vehicle both because he had agreed to drive a load of marijuana and  
9 because the vehicle was very difficult to drive due to the contraband  
10 in the tires.

11

12 **C. DEFENDANT'S CRIMINAL HISTORY**

13 Defendant does not have any convictions of which the United  
14 States is aware.

15

16 **III**

17 **WITNESSES**

18 The Government reserves the right to add, omit, substitute or  
19 change the order of witnesses. Presently, the Government intends to  
20 call the following witnesses during its case-in-chief:

- 21 1. Customs and Border Protection Officer James Williams
- 22 2. Customs and Border Protection Officer Michael Medley
- 23 3. Immigration and Customs Enforcement Special Agent Enrique  
24 Torregrosa
- 25 4. Immigration and Customs Enforcement Special Agent Lance  
26 Swanson
- 27 5. Immigration and Customs Enforcement Special Agent Vincent  
28 McDonald (value expert)

1 6. Ramona Sanderson, DEA Forensic Chemist

2 **IV**

3 **EXHIBIT LIST**

4 The Government will provide a final exhibit list on the morning  
5 of trial. Presently, the Government intends to offer into evidence  
6 the following:

7 1. Photographs of Port of Entry  
8 2. Photographs of Vehicle  
9 3. Value Chart (Demonstrative Purposes Only)  
10 4. Custody Receipt for Seized Property or Evidence  
11 5. DEA-7 Form  
12 6. Photographs of the marijuana recovered from the vehicle  
13 7. The actual marijuana recovered from the vehicle

14 **V**

15 **PERTINENT LAW**

16 **A. ELEMENTS OF THE CHARGED OFFENSES**

17 1. Title 21, United States Code Sections 952 & 960

18 The elements for the offense of importing Marijuana are:

19 a. Defendant intentionally brought marijuana into the  
20 United States; and  
21 b. Defendant knew that it was marijuana or some other  
22 prohibited drug.

23 9th Cir. Crim. Jury Instruction 9.27 (2003).

24 2. Title 21, United States Code, Section 841(a)(1)

25 The elements of the offense of possessing marijuana with the  
26 intent to distribute are:

27 a. Defendant knowingly possessed marijuana or some other  
28 prohibited drug in a measurable or detectable amount;  
and

1                   b.    Defendant possessed marijuana with the intent to  
2                    deliver it to another person.

3                   It does not matter whether a defendant knew that the substance  
4                   was marijuana. It is sufficient that a defendant knew that it was  
5                   some kind of prohibited drug. See 9th Cir. Crim. Jury Instruction  
6                   9.13 (2003). With regard to possession, the United States notes that  
7                   possession may be actual or constructive, and it may be proved by  
8                   direct or circumstantial evidence. See United States v. Magallon-  
9                   Jimenez, 219 F.3d 1109, 1112-1113 (9th Cir. 2000). Moreover, a  
10                  defendant's mere possession of a substantial quantity of a controlled  
11                  substance may show that the defendant knowingly possessed the  
12                  substance. See United States v. Diaz Cardenas, 351 F.3d 404, 407 (9th  
13                  Cir. 2003) (holding that jury could infer knowledge when an individual  
14                  is the driver and sole occupant of a vehicle containing 9.48 pounds  
15                  of methamphetamine (4.31 kilograms) and 17.65 pounds of cocaine (8.02  
16                  kilograms) concealed in the air bag of the vehicle); United States v.  
17                  Sanchez-Lopez, 879 F.2d 541, 555 (9th Cir. 1989) (finding 2.5  
18                  kilograms of cocaine sufficient to show knowledge and intent to  
19                  distribute and noting that a secret compartment within a vehicle used  
20                  to conceal illegal substances can raise an inference concerning  
21                  knowledge of the substance).

22                  Knowledge may also be proved by reasonable inferences from the  
23                  high street value of the narcotics. See United States v. Ogbuehi, 18  
24                  F.3d 807, 812 (9th Cir. 1994) ("DEA agents can testify as to the  
25                  street value of narcotics, . . . and counsel can argue reasonable  
26                  inferences from it") (citation omitted); United States v. Golden, 532  
27                  F.2d 1244, 1247 (9th Cir. 1976) (holding that "value of the heroin  
28                  found in the bags was relevant to both appellants' knowledge of the

1 presence of the heroin and intent to distribute"); Gaylor v. United  
 2 States, 426 F.2d 233, 235 (9th Cir. 1970) (testimony as to the selling  
 3 price of cocaine was relevant to issue of knowledge, since it tended  
 4 to refute "the possibility that a stranger could have placed such a  
 5 valuable cargo in a vehicle in the hope that the vehicle could be  
 6 followed and the cocaine later recovered in the United States").

7 With regard to distribution/delivery, the United States may prove  
 8 the "intent to deliver" element based on the following: a large  
 9 quantity of contraband (United States v. Diaz Cardenas, 351 F.3d at  
 10 407); the manner in which the controlled substance was packaged  
 11 (United States v. Glenn, 667 F.2d 1269, 1292 (9th Cir. 1982)); and the  
 12 street value of the narcotics (United States v. Davila-Escovedo, 36  
 13 F.3d 840, 843 (9th Cir. 1994)); United States v. Savinovich, 845 F.2d  
 14 834, 838 (9th Cir. 1988) (evidence of \$100,000 street value of  
 15 cocaine was relevant to proving defendant's intent to distribute);  
 16 United States v. Ramirez-Rodriguez, 552 F.2d 883, 885 (9th Cir. 1977)  
 17 (evidence of resale value of drug probative of intent to distribute).

18       **B. THE COURT SHOULD PERMIT UNITED STATES' EXPERT TESTIMONY**

19 If specialized knowledge will assist the trier-of-fact in  
 20 understanding the evidence or determining a fact in issue, a qualified  
 21 expert witness may provide opinion testimony on the issue in question.  
 22 Fed. R. Evid. 702. The trial court has broad discretion to admit  
 23 expert testimony. See e.g., United States v. Alonso, 48 F.3d 1536,  
 24 1539 (9th Cir. 1995). An expert may base his opinion on hearsay or  
 25 facts not in evidence where the facts or data relied upon are of the  
 26 type reasonably relied upon by experts in the field. Fed. R. Evid.  
 27 703. In addition, an expert may provide opinion testimony even if it  
 28

1 embraces an ultimate issue to be decided by the trier-of-fact. Fed.  
2 R. Evid. 704.

3       **1. Value of the Marijuana and Distributable Quantity**

4       The United States expects to present the testimony of an agent  
5 who will testify as an expert regarding the wholesale and street  
6 dollar value of the marijuana seized from the vehicle driven by  
7 Defendant. The expert will testify that the quantity of contraband  
8 seized from Defendant was far greater than a consumer would possess  
9 for personal use. The value testimony will focus on the wholesale and  
10 street values of the contraband, figures which have relevance to  
11 Defendant's intent to distribute. See Davila-Escovedo, 36 F.3d at 843  
12 ("A jury may infer intent to distribute from the quantity and value  
13 of the drug possessed"). The Ninth Circuit has upheld the  
14 admissibility of expert testimony as to the wholesale and retail value  
15 of drugs. See United States v. Mendoza-Paz, 286 F.3d 1104, 1112-1113  
16 (9th Cir. 2002).

17       It is expected that the expert will base his opinions on his  
18 experience investigating these types of cases, as well as his hands-on  
19 experience interrogating drug traffickers, debriefing confidential  
20 informants and discussing intelligence information with other agents.  
21 The United States has already provided defense counsel with notice of  
22 its intent to call a value expert. Consistent with the requirements  
23 of Fed. R. Crim. P. 16, the United States has provided Defendant with  
24 the name of its expert and a summary of the projected nature and scope  
25 of, as well as the basis for, this expert's testimony in anticipation  
26 of trial. The United States has also forwarded a copy of the expert's  
27 résumé. Accordingly, no basis exists for excluding the United States'  
28

1 expert testimony regarding the value of the contraband and that the  
2 amount found in the vehicle was a distributable quantity.

3       **2. Structure Evidence**

4       The United States does not intend to introduce expert testimony  
5 regarding structure in its case-in-chief. If the United States  
6 intends to present such evidence in rebuttal, it will do so consistent  
7 with United States v. Vallejo, 237 F.3d 1008, as amended, 246 F.3d  
8 1150 (9th Cir. 2001) and United States v. Valencia-Amezcu, 278 F.3d  
9 901, 909 (9th Cir. 2002). See also United States v. Pineda-Torres,  
10 287 F.3d 860, 866 (9th Cir. 2002) ("We have held that limited drug  
11 structure testimony is admissible in drug importation cases when the  
12 defense opens the door. . .")

13       **3. Blind Mule Testimony**

14       The United States may, however, elicit testimony that drug  
15 traffickers generally do not entrust large quantities of drugs to  
16 unknowing couriers or "blind mules." See United States v. Murillo,  
17 255 F.3d 1169, 1176-77 (9th Cir. 2001) (unknowing drug courier  
18 testimony admissible in drug possession case to attack defendant's  
19 defense that he was "simply an unknowing courier"), overruled in part  
20 on other grounds by United States v. Mendez, 476 F.3d 1077, 1080 (9th  
21 Cir. 2007); United States v. Campos, 217 F.3d 707, 712 (9th Cir.  
22 2000) (unknowing drug courier testimony was admissible in an  
23 importation case). Expert testimony that drug traffickers do not  
24 entrust large quantities of drugs to unknowing transporters is not  
25 drug courier profile testimony. See United States v. Cordoba, 104  
26 F.3d 225, 230 (9th Cir. 1997).

27       **4. The Substance Seized Was Marijuana**

28

1           Absent a stipulation, the United States intends to introduce the  
2 testimony of DEA Chemist Ramona Sanderson. It is expected that this  
3 chemist will testify that she performed various tests on the substance  
4 seized from the vehicle driven by Defendant. The chemist will  
5 testify, inter alia, that the results of these tests indicated the  
6 presence of marijuana. This chemist will base any expert opinions on  
7 her background, education, and experience, along with her knowledge  
8 and use of the accepted scientific methods used when testing unknown  
9 substances for the presence of controlled substances.

10 Consistent with Fed. R. Crim. P. 16, the United States has  
11 provided Defendant with the name of its DEA Chemist expert and a  
12 summary of the projected nature and scope of, as well as the bases  
13 for, this expert's testimony. The United States has forwarded a copy  
14 of the expert's resumé. Accordingly, no basis exists for excluding  
15 the United States' expert testimony that the substance seized from the  
16 vehicle was, in fact, marijuana.

VI

**PROPOSED VOIR DIRE**

19 1. The Court will instruct you about the law. Will you follow  
20 the law as given by the Court and disregard any idea or  
notion you have about what the law is or should be?

21 2. The Government will be calling witnesses employed by the  
22 Department of Homeland Security, Customs and Border  
23 Protection and Immigration and Customs Enforcement. Does  
anyone have family members or close friends who work, or  
have worked, for these agencies? Would that prevent you  
from being fair and impartial? Does anyone have any  
negative views of these agencies that would prevent you  
from being fair and impartial?

25 3. Has anyone had an unpleasant or negative experience with  
26 any law enforcement personnel? Would that cause you to be  
biased against law enforcement?

27 4. Has anyone ever had any disputes with any agency of the  
28 United States Government? If so, please describe.

- 1 5. Have you or any relatives or close friends ever been  
2 accused of, or charged with, a similar crime?
- 3 6. Has anyone had any training in the law? If so, please  
4 explain.
- 5 7. Will you be able to put aside any feeling of sympathy or  
6 pity for the defendant when deciding the facts of this  
7 case?
- 8 8. Does everybody understand that a defendant is entitled to  
9 a fair trial? Does everybody understand that the United  
10 States is also entitled to a fair trial?
- 11 9. Does anybody have any moral or religious reservations that  
12 might prevent him/her from standing in judgment of other  
13 human beings?
- 14 10. The defendant in this case is charged with importation of  
15 marijuana. Does anybody have strong feelings or opinions  
16 about U.S. narcotics laws that would prevent him/her from  
17 viewing the evidence impartially?
- 18 11. The law requires the government to prove its case against  
19 the defendant beyond a reasonable doubt. If you are  
20 selected, would you want the government to prove its case  
21 by a higher standard of proof, e.g. beyond any possible  
22 doubt?
- 23 12. Certain events in this case took place at the Andrade Port  
24 of Entry. Have any of you been sent to secondary  
25 inspection or had your vehicle searched at the Andrade Port  
26 or another port of entry? Have any of you had any strongly  
27 positive or strongly negative experiences at the Andrade  
28 Port or another port of entry? Do you believe this experience  
might prevent you from viewing the evidence in this case  
impartially?
13. Is anyone here involved in criminal defense work? Does  
anyone have any friends or family members who are involved  
in criminal defense work? Is anyone here involved in law  
enforcement? Does anyone have any friends or family  
members who are involved in law enforcement?
14. Regardless of any position you may have on the legalization  
or criminalization of marijuana, if you become a juror in  
this federal trial, will you be able to follow the  
federal law of the United States as it presently stands and  
as the judge instructs you regarding the criminal  
importation and possession of marijuana?

## VIII

### JURY INSTRUCTIONS

1 The United States will submit proposed jury instructions under  
2 separate cover. The United States reserves the right to submit  
3 additional instructions at the Fed. R. Crim. P. 30 conference.

4 DATED: July 18, 2008.

Respectfully submitted,

KAREN P. HEWITT  
United States Attorney

/s/ **Caleb E. Mason**  
Caleb E. Mason  
Assistant United States Attorney

/s/ Paul S. Cook  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ) Criminal Case No. 08cr1602DMS  
Plaintiff, )  
v. ) CERTIFICATE OF SERVICE  
MICHAEL DOUGLAS MOORE, )  
Defendant. )

IT IS HEREBY CERTIFIED that:

10 I, Caleb E. Mason, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

11 I am not a party to the above-entitled action. I have caused  
12 service of **GOVERNMENT'S TRIAL MEMORANDUM** on the following parties by  
13 electronically filing the foregoing with the Clerk of the District  
Court using its ECF System, which electronically notifies them.

14 1. John Ellis, Federal Defenders of San Diego, Inc.

15 I hereby certify that I have caused to be mailed the foregoing,  
16 by the United States Postal Service, to the following non-ECF  
participants on this case:

None

18 the last known address, at which place there is delivery service of  
19 mail from the United States  
Postal Service.

20 I declare under penalty of perjury that the foregoing is true and  
21 correct.

Executed on July 18, 2008.

/s/ **Caleb E. Mason**  
CALEB E. MASON